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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The
Supreme Court of the United States

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Petitioners,

v.

EVON BILLUPS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Emmet J. Bondurant
Counsel of Record
David G.H. Brackett
Jason J. Carter
BONDURANT, MIXON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, GA 30309
(404)881-4100

Edward Hine, Jr.
LAW OFFICES OF EDWARD HINE JR., PC
111 Bridgepoint Plaza, Ste. 300
P.O. Box 5128
Rome, GA 30162-5128

Miles Alexander
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309-4530

Ralph Irving Knowles, Jr.
DOFFERMYRE, SHIELDS, CANFIELD, KNOWLES & DEVINE
1355 Peachtree Street, N.E.
Suite 1600
Atlanta, GA 30309

Seth Cohen
171 17th St. NW
Suite 2100
Atlanta, GA 30363-1032

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The Court of Appeals upheld the validity of the 2006 Georgia Photo ID Act on the ground that, "*Anderson* [*v. Celebrezze*, 460 U.S. 780, 789 (1983)] does not require any evidentiary showing or burden of proof to be satisfied by the state government ... Nor do the more recent decisions in *Burdick* [*v. Takushi*, 504 U.S. 428, 434 (1992)] and *Crawford* [*v. Marion County Board of Elections*, 553 U.S.___, 128 S. Ct. 1610 (2008)] place an evidentiary burden on the state when defending a voting regulation." 554 F.3d 1340, 1353 (11th Cir. 2009) (emphasis added).

Does this ruling,

1. obliterate the well-established distinction between the heightened standard of review that applies to statutes that infringe fundamental rights protected by the First and Fourteenth Amendments, and the highly deferential rational basis standard of review that applies to other economic or social legislation? and

2. conflict directly with the decisions of this Court (i) in *Crawford v. Marion County Board of Elections*, 553 U.S.___, 128 S. Ct. 1619, 1628 (2008), which requires that any burden on the right to vote '[h]owever slight [,] ... be justified by relevant and legitimate state interests," (emphasis added), (ii) in *Norman v. Reed*, 502 U.S. 279, 288-89 (1992) in which this Court "called for the demonstration [by the state] of a corresponding interest sufficiently

weighty to justify the limitation" (emphasis added), and (iii) in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) which held that a reviewing court is required to "identify and evaluate the precise interests put forward by the State as justification for the burden imposed" by a photo ID requirement on the right to vote and "determine the legitimacy and strength of each of those interests [and] ... the extent to which those interests make it necessary to burden plaintiff's rights." (emphasis added).

THE PARTIES

The Petitioners are The National Association for the Advancement of Colored People (NAACP), Inc., through its Georgia State Conference of Branches; Eugene Taylor; and Bertha Barrett Young. The following were plaintiffs in the proceedings below until August 24, 2007, and are not Petitioners: Common Cause/Georgia; League of Women Voters of Georgia, Inc.; Central Presbyterian Outreach and Advocacy Center, Inc.; Georgia Association of Black Elected Officials, Inc.; Georgia Legislative Black Caucus; Concerned Black Clergy of Metropolitan Atlanta, Inc.; Tony Watkins; and Clara Williams.

The Respondents are Ms. Evon Billups, Superintendent of Elections for the Board of Elections and Voter Registration for Floyd County and the City of Rome, Georgia; Ms. Tracy Brown, Superintendent of Elections of Bartow County, Georgia; Mr. Gary Petty, Member of the Board of Elections and Registration of Catoosa County, Georgia; Ms. Michelle Hudson, Member of the Board of Elections and Registration of Catoosa County, Georgia; Ms. Amanda Spencer, Member of the Board of Elections and Registration of Catoosa County, Georgia; Cathy Cox, former Secretary of State of Georgia and former Chair of the Georgia Election Board in her individual capacity; Karen C. Handel, individually, and in her official capacity as Secretary of State of Georgia and Chair of the Georgia Elections Board; and the State Election Board. All Respondents were defendants below.

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The opinion of the Court of Appeals for the Eleventh Circuit was filed on January 14, 2009, is officially reported at 554 F.3d 1340, and is reproduced in the appendix (App. 1a-29a).

The District Court granted three preliminary injunctions. Two of the opinions of the district court are officially reported in *Common Cause v. Billups* (*Common Cause I*), 406 F. Supp. 2d 1326 (N.D. Ga. Oct. 18, 2005) (reproduced at App. 30a-141a), *Common Cause v. Billups* (*Common Cause II*), 439 F. Supp. 2d 1294 (N.D. Ga. July 14, 2006) (reproduced at App 142a-282a). The third opinion, dated September 15, 2006, *Common Cause v. Billups* (*Common Cause III*), is unpublished and reproduced in the appendix (App. 283a-315a). The final opinion of the District Court which dismissed the complaint for want of standing and alternatively ordered the entry of a final judgment in favor of defendants on the merits is reported in *Common Cause v. Billups* (*Common Cause IV*), 504 F. Supp. 2d 1333 (N.D. Ga. Sept. 6, 2007) and is reproduced in the appendix (App. 316a-420a).

JURISDICTION

The judgment of the circuit court sought to be reviewed was entered on January 14, 2009. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because this petition is being filed within 90 days of the entry of the judgment sought to be reviewed. This court has jurisdiction to review the judgment of the Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The statutory provision involved is the 2006 Georgia Photo Identification Act. O.C.G.A. § 21-2-417.1; 2006 Ga. Laws, p. 3. The Act is reproduced in full at App. 421a-424a.

STATEMENT

This case arises out of a challenge under the First and Fourteenth Amendments to the 2006 version of the Georgia Photo ID Act both, on its face and as applied, on the ground that the act imposes a significant and unnecessary burden on the right to vote of the plaintiffs, and of hundreds of thousands of other poor, elderly or disabled registered voters who do not have Georgia driver's licenses, passports or any other approved form of photo identification.

Georgia's 2005 Photo ID Act was repealed after its enforcement was enjoined by the district court. *Common Cause v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). In 2006, the Georgia legislature re-enacted the photo ID requirements for in-person voters, but eliminated the $20 fee for a Voter ID Card that had been increased by the 2005 Act.

Neither the 2005 Act, nor the 2006 Act contained any legislative findings or a statement of legislative purpose. In the proceedings below, no members of the legislature or other witnesses testified concerning the purpose of the Act; nor did the state offer any other evidence of legislative purpose. The state also failed to offer any evidence that would permit a court to evaluate the "strength" of the State's interest, to determine why that interest made it "necessary" to burden the right to vote of petitioners and hundreds of thousands of Georgia voters, or to explain why the legislature thought it was necessary to impose a photo ID requirement solely on voters who vote in person, while imposing no comparable requirement for absentee ballots that have been a persistent source of fraud.

The petitioners contended at trial that once they proved that the Photo ID Act imposed *some* burden

on their First Amendment rights to vote, they had carried their initial burden of proving that the Act was presumptively unconstitutional, and that the burden of production then shifted to the state to come forward with admissible evidence that (1) the photo ID Act was adopted to serve a legitimate state interest, (2) that the state's interest was not only legitimate, but of sufficient "strength" to both justify and outweigh the burden imposed by requiring the hundreds of thousands of poor, elderly and disabled citizens who are lawfully registered, but do not have driver's licenses or means of transportation, to make a special trip to the County registrar's office to obtain a Voter photo ID, and (3) that the state's interest made it "necessary" to burden plaintiff's rights. There was an abundance of evidence of record that the photo ID requirement was unnecessary and was not drafted to prevent the kind of fraud that was known to exist in Georgia. *See* pp_____ below. None of this evidence was rebutted by the State.

The district court's ruling. The district court ruled that the state had no burden to prove that the new photo ID requirement was adopted to serve a legitimate state interest, rather than the purely partisan interests of the Republican-dominated legislature. The court acknowledged that "plaintiffs contend that the State Defendants have not proffered admissible evidence as to the interest supporting the 2006 Photo ID Act." The court ruled, however, that state was not required to produce any evidence that the Act was intended to serve a legitimate state interest and that the petitioners had the burden of proving that the Act was *not* so intended. *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1381 n.8 (N.D. Ga. 2007). The court ruled in the alternative that "the evidence in the record is

sufficient to support a finding that the State Defendants introduced the 2006 Photo ID Act in an effort to prevent fraud in voting" (*Id.*) without, however, pointing to any evidence to support this finding.

Although the district court discussed the sliding scale standard in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), the court did not apply this standard. Instead, it ruled that requiring voters who cannot drive to make a special trip to the county registrar's office to obtain a photo ID, was not a "severe" burden because it did not *prevent* them from voting. *Common Cause*, 504 F. Supp. 2d at 1380-81.

Having ruled that the burden on petitioners' rights was not "severe," the district court ruled that "the appropriate inquiry is whether the Photo ID requirement is *rationally related* to the interest the State seeks to further – preventing fraud in voting." Applying this standard, the district court found "that the Photo ID requirement is *rationally related* to that interest." *Id.* at 1381, ¶ 46 (emphasis added).

The Ruling of the Court of Appeals. The Court of Appeals reversed the district court insofar as the district court had ruled that neither the individual petitioners, nor the NAACP had standing (Slip Op. pp. 15-21). The court rejected petitioners' contention that the district court had applied the rational basis standard of review in assessing the merits of plaintiffs' First and Fourteenth Amendment claims. The court said that "although the district court used some language associated with rational basis review ... [t]he district court applied the correct [legal] standard." Slip Op. p. 23.

The Court of Appeals did not directly address petitioners' arguments (1) that there was no evidence

in the record to support the district court's finding in footnote 8 that the state had presented admissible evidence that the 2006 Photo ID Act had been enacted to prevent fraud, and (2) that there was no evidence to show that it was "necessary to burden the plaintiff's rights" (*Anderson,* 460 U.S. at 789; *Burdick,* 504 U.S. at 434), in order to further any legitimate interest that the state might be assumed to have had in preventing fraud. The court ruled instead that:

> *Anderson* does not require any evidentiary showing or burden of proof to be satisfied by the state government ... Nor do the more recent decisions in *Burdick* ... and *Crawford* ... place an evidentiary burden on the state when defending a voting regulation.

Slip Op. p. 24.

Petitioners seek review of this ruling by writ of certiorari.

REASONS FOR GRANTING CERTIORARI

I. The Standard of Review Applied by the Court of Appeals Conflicts with Decisions of this Court.

The ruling of the circuit court – that the state had *no* burden to prove that the photo ID requirement was intended to further a legitimate state interest and that the court could simply *assume,* without evidence, that the purpose of the statute was to prevent fraud – conflicts directly with the standard of review in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and reaffirmed by a majority of this Court in *Crawford v. Marion County Board of Elections*, 553

U.S.___, 128 S. Ct. 1610, 1616 (2008). The standard of review applied by the circuit court is the equivalent of the *rational basis standard* – or the "novel 'deferential important regulatory interests' standard" advocated by Justice Scalia in *Crawford*. This standard was specifically *rejected* Justice Stevens in the lead opinion (128 S. Ct. at 1616, n.8), and by the three dissenting Justices.

The ruling of the Court of Appeals obliterates the well- established distinction between the heightened standard of review that applies to statutes that infringe fundamental rights protected by the First and Fourteenth Amendments, and the highly deferential rational standard of review that applies when statutes regulating social or economic policies, without infringing fundamental rights or burdening a suspect class, are challenged under the Equal Protection Clause. *See District of Columbia v. Heller*, 553 U.S. ___, 128 S. Ct. 2783, 2818 n.27 (2008) ("Rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws.... *Obviously the same test could not be used to evaluate the extent to which a legislature may regulate a specific enumerated right...*") (emphasis added).

The legal and practical differences between the two standards are enormous and outcome determinative. Statutes that infringe fundamental rights are presumed to be unconstitutional. The state has the burden of proving on the record that the statute was in fact, and not in theory, enacted to serve a legitimate state interest that made it necessary to burden a plaintiff's right to vote or some other fundamental right. *Harris v. McRae*, 448 U.S. 297, 312 (1980) ("It is well settled that ... if a law

'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.'"); *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) ("[W]e have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right."); *United States v. Playboy Entm't. Group, Inc.*, 529 U.S. 803, 816-17 (2000) ("When the Government restricts speech, the government bears the burden of proving the constitutionality of its actions."); *see also Watchtower Bible & Tract Soc'y of N.Y., Inc v. Village of Stratton*, 536 U.S. 150, 170 (2002) ("In the intermediate scrutiny context, the Court ordinarily does not ... supply reasons the legislative body has not given ... [W]e expect a government to give its real reasons for passing an ordinance ...") (concurring opinion); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000) ("[w]e have never accepted mere conjecture as adequate to carry a first amendment burden of proof.").

The opposite rule applies to a statute that regulates "social and economic policy ... that neither proceeds along suspect lines nor infringes fundamental constitutional rights." *FCC v. Beach Communs., Inc.*, 508 U.S. 307, 313 (1993). When such a statute is challenged under the Equal Protection Clause, the legislature is not required to articulate its reasons for enacting the statute. *Id.* at 315. The statute is presumed to be constitutional, and "those attacking the rationality of the legislative classification have the burden 'to negat[e] every conceivable basis which might support it.'" *Id.* at 314-15.

In *Crawford*, this Court held that any burden "that a state law imposes on a political party, an

individual voter, or a discrete class of voters ... [h]owever slight that burden may appear ... must be *justified* by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" 128 S. Ct. at 1616 (emphasis added). And in *Norman v. Reed*, 502 U.S. 279, 288-89 (1992), this Court "called for the *demonstration* of a corresponding interest sufficiently weighty to *justify* the limitation." (Emphasis added). The requirement that the state "*justify*" a statute that burdens the right to vote is meaningless, if all photo ID statutes are presumed to be constitutional and the state is not required, as the Eleventh Circuit held, to make any evidentiary showing or to satisfy any burden of proof.

The decision of the Court of Appeals violates the first .principle of the judicial process that the decisions of a court must be made based on *admissible evidence in the record, and not an unproven assumptions or hearsay..*

The decision of the Court of Appeals also conflicts directly with *Anderson v. Celebrezze* which requires that courts resolve challenges to state election regulations by a four-step analytical process that parallels their work in ordinary litigation. 460 U.S. at 789. *Anderson* requires that a court "first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Id.* The plaintiff has the burden of proof on that issue which is an element of Article III standing.

Once the plaintiff carries this initial burden of proving that the state voting regulation imposes a burden injury "however slight" on rights of "a political party, an individual voter, or a discrete class of voters" to vote (*Crawford*, 128 S. Ct. at 1616), the statute or regulation is presumed to be

unconstitutional (*Harris v. McRae*, 448 U.S. 297) and the burden of production then shifts to the state to produce admissible evidence to rebut the presumption of unconstitutionality by proving that the burden is "*justified*."

To prove that the burden is "justified," *Anderson* requires a state to prove, as a matter of *fact*, that the *real purpose* (and not merely the hypothetical purpose) of the statute is to serve a state interest that is both "*legitimate*" and of sufficient "*strength*" to outweigh the burden on the plaintiff's right to vote. In addition, the state must also show that the state's interests "make it *necessary* to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789 (emphasis added). *See Crawford*, 128 S. Ct. at 1616.

Where, as in this case, the state fails to offer any record evidence of legislative purpose, a court has no basis to make the "hard judgments that must be made" (*Anderson*, 460 U.S. at 790) in ruling on the constitutionality of the statute that *Anderson* and *Burdick* require:

(i) The court cannot "*identify* and *evaluate* the interests put forward by the State as justifications for the burden imposed by its rule."

(ii) The court cannot "determine the *legitimacy* and *strength* of each of those interests,"

(iii) The court cannot "consider the extent to which those interests make it *necessary* to burden plaintiff's" rights.

(iv) The Court cannot *weigh* "all these factors [and] ... decide whether the

> challenged provision is unconstitutional."

460 U.S. at 789 (emphasis added).

This case highlights the importance of requiring a state to justify the burden imposed by the photo ID act on petitioners' First Amendment rights by offering concrete, admissible evidence of each of the *Anderson* factors. First, there was an abundance of evidence in the record that the Photo ID requirement was not drafted to prevent the fraud that was known to exist in Georgia. Indeed, the district court specifically found that "the 2006 Photo ID statute, like its predecessor,... does nothing to address the voter fraud issues that conceivably exist in Georgia ... [and that] the State, in theory once again left the field wide open for voter fraud in absentee voting" (*Common Cause II*, 439 F. Supp. 2d at 1350). The district court also found that the photo ID requirement will not prevent fraud even in in-person voting because "a voter who registered fraudulently several years ago now may use his or her fraudulent voter registration application to obtain a Voter ID card, which he or she may use to vote in person." *Id.* at 1339; *see also Common Cause I*, 406 F. Supp. 2d at 1342; *Common Cause IV*, 504 F. Supp. 2d at 1381 n.9.[1]

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[1] The district court even found that "the Photo ID requirement ... likely is not rationally based on [State's] proffered interest of preventing fraud." *Common Cause I*, 406 F. Supp. 2d at 1366. Although the state offered no evidence at any of the subsequent hearings to contradict this finding, the district court backtracked and said that its earlier finding was "speculative." *Common Cause IV*, 504 F. Supp. 2d at 1381 n.9.

Second, the evidence of record also shows both that there was no "special crime problem" involving in-person voting in Georgia (*Watchtower Bible & Tract Soc'y*, 536 U.S. at 169), and that the photo ID requirement was not "necessary." *Anderson*, 460 U.S. at 789; *see Dunn v. Blumstein*, 405 U.S. 330, 353-54 (1972) (A burden is not "necessary" if the so-called evil which the statute is intended to remedy has already been remedied by existing laws and procedures.). Voters were required by existing Georgia law to present one of seventeen forms of identification before being issued a ballot and allowed to vote in person at the polls (1997 Ga. Laws, p. 664-65). The district court found, based on the testimony of Georgia Secretary of State Cathy Cox: (1) that "during her entire tenure ... she had not received a complaint of in-person voter impersonation ... [and] that the system previously in place weeds out opportunities for voter fraud and has been effective." *Common Cause II*, 439 F. Supp. 2d at 1330.[2] *See also Common Cause IV*, 504 F. Supp. 2d at 1356 (¶ 89); (2) "that she knew of no reason why a Photo ID should make a difference or prevent any fraud in the context of in-person voting." *Common Cause II*, 439 F. Supp. 2d at 1331. *See also Common Cause I*, 406 F. Supp. 2d at 1351; (3) that "Georgia also imposes criminal penalties for voter impersonation. most

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[2] The factual findings that were made by the district court at the three preliminary injunction hearings were based on testimony and documents that would have been "admissible at trial" and were a "part of the record" at the trial on petitioners' motion for a permanent injunction and did not have to be repeated. Fed.R.Civ.P. 65(a). The state offered *no* evidence at the final hearing to contradict or rebut any of Secretary of State Cox's testimony in the earlier hearings that would have justified the district court in changing any of its earlier findings.

violations ... are punishable as felonies [and] ... no evidence indicates that the criminal penalties do not sufficiently deter in-person voter fraud" (*Common Cause I*, 406 F. Supp. 2d at 1351); (4) that unlike the bloated and out-dated voter rolls in Indiana, Georgia's voter registration rolls are maintained on a computerized state-wide database that is purged monthly of the names of voters who have died that is available on a terminal at every polling place (*Common Cause IV*, 504 F. Supp. 2d at 1356-57 (¶ 95)); *Common Cause I*, 406 F. Supp. 2d at 1351). Third, the district court found that:

> [T]he State has a number of significantly less burdensome alternatives available to prevent in-person voting fraud, such as the voter identification requirement previously used [under the 1997 law] and numerous criminal statutes penalizing voter fraud .... Given those available alternatives, the court finds that the state could have avoided placing a severe burden on voters.

Common Cause II, 439 F. Supp. 2d at 1351.[3]

Fourth, the record evidence also showed that the "strength" of any interest the State might arguably be said to have had in imposing an additional level of protection against what is at most a hypothetical risk

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[3] The district court refused to give any weight to these earlier findings. The court said these findings would be relevant only if it found that the burden on petitioners' rights was "severe" and subjected the act to strict scrutiny when it refused to do so. *Common Cause IV*, 504 F. Supp. 2d at 1381 (¶ 45).

that a person or a small group of people *might* attempt to impersonate a voter at the polls, was relatively weak when weighed against the effect that a photo ID requirement would have on voter participation on the part of hundreds of thousands of poor, elderly, disabled, and particularly African-American voters who do not have a driver's license or access to a car.

In *Crawford*, this Court held that the fact that the Indiana legislation was adopted by straight party-line vote of the Republican-dominated Indiana legislature, was not, *standing alone*, sufficient to invalidate the statute *because there was record evidence of a non-discriminatory neutral basis for the requirement. Crawford*, 128 S. Ct. at 1624. In this case, there was not only evidence that the Photo ID Act was highly partisan, there was no evidence that the voter registration lists in Georgia were inflated, and were not up-to-date. There was also evidence that the Georgia Act has a disproportionate impact on African-American voters,[4] who are far more likely to vote Democratic that white voters, especially in the South. *See Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) ("No doubt most people who don't have photo ID are low on the economic ladder and ... are more likely to vote for Democratic than Republican candidates."). The convergence of these additional facts made heightened scrutiny in this case especially necessary. *See Anderson*, 460 U.S. at 793 ("[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic

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[4] *See* p. 15 below.

status."); *Anderson*, 460 U.S. at 794, n.16 ("In addition, because the interests of minor parties are not well represented in state legislatures,[5] the risk that the First Amendment rights of those groups will be ignored in legislature decision-making may warrant more careful judicial scrutiny."); *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (The State is "not a wholly independent or neutral arbiter ... [but] is itself controlled by the political party ... in power, which ... has the incentive to shape the rules of the electoral game.... In such cases, heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions.") (concurring opinion).

Because the state offered no evidence of the legislative purpose of the statute, the trial court and the Court of Appeals had nothing to "weigh" against the burden of petitioners' First and Fourteenth Amendment rights. In the absence of such evidence, the lower courts should have entered judgment in petitioners' favor just as a court would in any other case in which a party fails to come forward with admissible evidence to support a claim or defense for which it has the burden of proof. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257-58 (1986).

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[5] This is certainly true of the Democratic Party in Georgia where the office of Governor, Lieutenant Governor, Secretary of State and both houses of the legislature (both U.S. and Senate seats) are held by Republicans.

II. This Case Differs from *Crawford*.

The ruling in *Crawford* is not determinative of the merits of this case because of three material differences between both the procedural posture and substantive evidence of record in this case as compared to *Crawford*. These differences make review of this case by certiorari especially appropriate.

First, *Crawford* was a purely *facial challenge* to the validity of the Indiana Photo ID Act. This factor was determinative from a procedural standpoint and dictated the outcome in *Crawford*, which simply followed the ruling a month earlier in *Washington State Grange v. Washington State Republican Party*, 552 U.S. ____, 128 S. Ct. 1184, 1184 (2008) that "[a] plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the challenged act would be valid." Citing evidence in the record indicated that "99% of Indiana's voting age population already possesses the necessary photo identification to vote under the requirements" of the Indiana Act (*Crawford*, 128 S. Ct. at 1615 n.6), the majority ruled that "the evidence in the record is not sufficient to support a *facial* attack on the validity of the entire statute." *Id.* at 1615. (emphasis added); and *see Crawford*, 128 S. Ct. at 1623 ("A *facial challenge* must fail where the statute has a 'plainly legitimate sweep.' When we consider *only* the statute's broad application to *all* Indiana voters, we conclude that it imposes only a limited burden on voters' rights.") (emphasis added) (citations omitted).

Unlike *Crawford*, petitioners' challenge to the validity of the Georgia Photo ID Act was not a solely facial challenge. Petitioners challenged the Georgia statute not only on its face, but also *as applied to*

petitioners and to the hundreds of thousands of *registered* voters in Georgia who do not have driver's licenses (the most commonly available form of Photo ID), or any other form of official Photo ID.

Second, the lead opinion in *Crawford* emphasized that the Indiana photo ID law was justified by the fact that the voter registration rolls in Indiana were badly out of date and were inflated by 41.4% with the name of voters who had died or moved to another state. *See Crawford*, 128 S. Ct. at 1617 ("[E]vidence credited by Judge Barker estimated that as of 2004 Indiana's voter rolls were inflated by as much as 41.4%."). The Court ruled that "the fact of inflated voter rolls ... provide[d] a neutral and non-discriminatory reason supporting the State's decision to require photo identification" (*Crawford*, 128 S. Ct. at 1620), and was "sufficiently strong to require us to reject petitioners' facial attack on the statute." *Id.* at 1624.

The record in this case shows the exact opposite from the record in *Crawford*. The Georgia Secretary of State testified that Georgia's voter registration rolls are up-to-date and are purged monthly of the names of voters who have died or moved to another state. The registration list is maintained by the Georgia Secretary of State in a state-wide computerized database, and is linked to computer terminals at every polling place. *Common Cause IV*, 504 F. Supp. 2d at 1356-57 (¶ 95); *Common Cause I*, 406 F. Supp. 2d at 1357.

Third, the evidentiary record in this case is far more complete than was the record in *Crawford*. The lead opinion in *Crawford* emphasized that "the evidence in the record does not provide us with the number of registered voters without photo identification." *Crawford*, 128 S. Ct. at 1622. The

record in this case showed that there were hundreds of thousands of citizens of voting age in Georgia who do not have a driver's license or access to a car.[6]

There was also no record evidence in *Crawford* that a photo ID requirement would have a discriminatory impact on African-American voters, as a group, as compared to white voters. African-American voters in Georgia are much poorer than white voters and do not have access to a car in far greater numbers than white voters. *See Common Cause I*, 406 F. Supp. 2d at 1342 ("17.7 percent of African-American households have no vehicle, as compared to 4.4% of Caucasian, non-Hispanic households in Georgia."); *Common Cause II*, 439 F. Supp. 2d at 1306 ("[T]he median income of Caucasian households in Georgia is almost twice that of African-

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[6] "United States Department of Transportation data indicates that Georgia may have as many as 874,420 citizens of driving age who do not have driver's licenses. [C]ensus data indicate that 390,414 Georgians of voting age and 242,949 Georgia households do not have access to a car .... The Census Bureau further reported that 140,000 African-American households in Georgia, as compared to 89,000 Caucasian households in Georgia, lacked access to a car." *Common Cause II*, 439 F. Supp. 2d at 1306. The Census data is consistent with the comparison *prepared by the State Defendants* of the Secretary of State's database of 5,084,239 registered voters with the names in the Department of Driver Services' database. (Def. Ex. 37 & PX 98). This showed that there are 198,378 registered voters who have never had a Georgia driver's license (*Common Cause IV*, 504 F. Supp. 2d at 1362 (¶ 146)); another 91,048 registered voters do not have a driver's license in their possession that could be used for identification purposes at the polls because their licenses have been surrendered, cancelled or revoked. Although African-Americans constitute only 28% of Georgia's population, defendants' data also showed that 49% of these 289,000 registered voters without driver's licenses are black.

American households ... twenty-eight percent of African-Americans live ... in poverty, as compared to ten percent of Caucasians in Georgia. The Census Bureau further reported that 140,000 African-American households in Georgia, as compared to 89,000 Caucasian households in Georgia lacked access to a car.").

For these reasons, the ruling in *Crawford* is not determinative of the merits of petitioners' claims that the Georgia Photo ID Act imposes a burden on their First and Fourteenth Amendment rights to vote that is not, and cannot, be justified under the standard of review in *Anderson*, *Burdick* and *Crawford*.

III. Clarifying the Parameters of *Crawford* Is Necessary to Protect Citizens' Right to Vote Throughout the Nation.

The Eleventh Circuit's decision stands as one example of broader confusion in the federal courts about the standard of review to be applied to laws banning registered voters who lack a photo ID from voting. In addition to the Eleventh Circuit's decision, the Tenth Circuit has issued an opinion illustrating further confusion as to the appropriate standard of review to apply when states ban registered voters who lack photo ID from voting. In *ACLU of N.M. v. Santillanes*, 506 F. Supp. 2d 598, 629 (D.N.M. 2007), the district court ruled that the government had a "burden of coming forward with ***some admissible evidence*** to show that the photo ID law is tailored to advance the precise governmental interest for which it was enacted." (emphasis added.) On review, the Tenth Circuit evaluated the law on equal protection grounds.[7] *ACLU of N.M. v. Santillanes*, 546 F.3d

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[7] The plaintiffs in *Santillanes* originally alleged that the voter ID law not only violated the Equal Protection clause, but

1313, 1322 n.2 (2008). The Tenth Circuit ruled that the district Court imposed "too high a burden" on the State. Yet, the Tenth Circuit did not articulate in any way what an appropriate burden might be, or whether the district was incorrect in concluding that there was any evidentiary burden at all. *Id.* at 1323. Thus, at least two circuits, albeit in different ways, have illustrated confusion over the crucial distinction at the heart of the *Crawford* decision: the difference between rational basis review (which was rejected by the Court in *Crawford*), and the heightened standard of review that the Constitution requires.

This Court should clarify that rational basis review is an improper and insufficient standard of review when a law burdens the right to vote. Such clarification is particularly necessary in light of the proposed legislation in states across the country that would ban registered voters who lack photo ID from exercise their right to vote. During states' current legislative sessions, at least six have considered requiring a photo ID as precondition to voting, with more states presumably to follow.[8]

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the right to vote under the First Amendment. 546 F.3d at 1322. The district court, however, rejected the First Amendment challenge, and ruled with the plaintiffs on their Equal Protection Claim. Accordingly, because plaintiffs did not appeal, only the Equal Protection issue was before the Tenth Circuit. *Id.* at 1322 n. 2. The Tenth Circuit nonetheless refused to apply the heightened pleading standard in *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182 (1999) on the ground *Buckley* was "a First Amendment challenge, not an equal protection challenge to a person's right to vote." 546 F.3d at 1322 n.2. *Compare Anderson*, 460 U.S. at 788 n.7 ("we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis.").

[8] Gina Smith, *Voter ID wins key approval*, The State, Feb. 27, 2009 (South Carolina); Jason Rosenbaum, *Voter ID back in*

To protect against the further erosion of the rights of registered voters who lack photo ID, it is crucial that this court expeditiously affirm the critical distinction between: (1) the review mandated by *Anderson*, *Burdick* and *Crawford*, and (2) rational basis review. Voters in many states will elect governors, state legislators, and county and municipal offices in the fall of 2009, and 435 Representatives and 34 Senators, as well as numerous state officials in the 2010 election cycle. Their right to vote is their most fundamental right because it is "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S. Ct. 1362, 1381 (1964). As partisan legislatures across the country enact Photo ID requirements that curtail this fundamental right, this Court should provide lower courts with further guidance to ensure that voters' fundamental rights are safeguarded. The fundamental right to vote should not be trampled by an utter lack of evidentiary accountability. Only a statement from this court can prevent that result.

Legislature in Missouri, Daily Record, Feb. 18, 2009 (Missouri); David White, *Panel votes on party lines to delay bill to require voter ID*, Birmingham News, Feb. 12, 2009 (Alabama); Jake Grovum, *GOP legislators want photo IDs for voting in Minnesota*, Star Tribune, Jan. 27, 2009 (Minnesota); Clay Robinson, *Republicans revive voter ID proposal*, Houston Chronicle, Dec. 15, 2008 at B1 (Texas); Andy Sher, *Tennessee: Winds of change expected with GOP control*, Chattanooga Times Free Press, Nov. 10, 2008 (Tennessee).

CONCLUSION

The ruling of the Eleventh Circuit is a drastic departure from the established rules governing challenges to state election regulations and turns all of those rules on their head. It should be reviewed by this Court in a petition for a writ of certiorari and reversed.

Respectfully Submitted,

Emmet J. Bondurant
(Counsel of Record)
David G.H. Brackett
Jason J. Carter
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
404-881-4100

Edward Hine, Jr.
LAW OFFICES OF EDWARD HINE, JR., PC
111 Bridgepoint Plaza
Suite 300
P.O. Box 5128
Rome, Georgia 30162-5128

Miles Alexander
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309-4530

Ralph Irving Knowles, Jr.
DOFFERMYRE, SHIELDS, CANFIELD, KNOWLES & DEVINE
1355 Peachtree Street, N.E.
Suite 1600
Atlanta , GA 30309

Seth Cohen
171 17th St. NW
Suite 2100
Atlanta, GA 30363-1032